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No. 81-6633

IN THE
Supreme Court of the United States

OCTOBER TERM, 1982

DANNY R. BEARDEN,

Petitioner,

v.

STATE OF GEORGIA,

Respondent.

On Writ Of Certiorari To The Court Of Appeals Of Georgia

BRIEF FOR PETITIONER

JAMES H. LOHR
428 McCallie Avenue
Chattanooga, TN 37402
(615) 756-5880
Counsel for Petitioner

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QUESTION PRESENTED FOR REVIEW

Does the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States prohibit the revocation of an indigent defendant's probation for his failure to pay a fine and restitution when that probation is being served under the Georgia First Offender's Act?

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CITATION TO OPINIONS OF COURTS BELOW

There is no written opinion from the trial court or from the Supreme Court of Georgia. The citation for the opinion from the Court of Appeals of Georgia is: *Bearden* v. *State*, ____ Ga. App. ____, 288 S.E.2d 662 (1982).

GROUNDS FOR JURISDICTION

The judgment of the Court of Appeals of Georgia sought to be reviewed was dated and entered February 24, 1982. The petitioner filed a timely motion for rehearing which was denied on March 15, 1982. The petitioner subsequently filed a timely petition for writ of certiorari in the Supreme Court of Georgia which was denied on April 8, 1982.

The provisions of 28 U.S.C. § 1257(3) confer upon this Court jurisdiction to review the judgment of the Court of Appeals of the State of Georgia by writ of certiorari.

CONSTITUTIONAL PROVISIONS AND STATEMENTS INVOLVED

U.S. Constitution Amendment 14, § 1

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Georgia Code Annotated § 27-2727

> Upon a verdict or plea of guilty or a plea of nolo contendere but before an adjudication of guilt, the court may, in the case of a defendant who has not been previously convicted of a felony, without enter-

ing a judgment of guilt and with the consent of the defendant, defer further proceeding and place the defendant on probation as provided by the Statewide Probation Act [§§ 27-2702 through 27-2726.1]. Upon violation of the terms of probation, or upon a conviction for another crime, the court may enter an adjudication of guilt and proceed as otherwise provided. No person may avail himself of the provisions of this law [§§ 27-2727 through 27-2732] on more than one occasion.
(Acts 1968, pp. 324, 325.)

Georgia Code Annotated § 27-2728

Upon fulfillment of the terms of probation, or upon release by the court prior to the termination of the period thereof, the defendant shall be discharged without court adjudication of guilt. Such discharge shall completely exonerate the defendant of any criminal purpose, shall not effect any civil right or liberties, and he shall not be considered to have a criminal conviction. Should a person be placed under probation under this law [§§ 27-2727 through 27-2732], a record of the same shall be forwarded to the Georgia Crime Information Center. Without request of the offender, a record of discharge and exoneration, as above provided, shall in every case be forwarded to the Georgia Crime Information Center. In every case in which the record of Probation shall have been previously forwarded to the office of the State Probation System, the Georgia Crime Information Center and to the Identification Division of the Federal Bureau of Investigation and a record of a subsequent discharge and exoneration of such offender has not been forwarded as above provided, upon request of the offender or his attorney or representative such record of the same shall be forwarded by the clerk of the Court so as to reflect such discharge and exoneration.
(Acts 1968, pp. 324, 325; 1978, p. 1621, eff. July 1, 1978.)

Georgia Code Annotated § 27-2728.1

> Except as otherwise provided in this law [§§ 27-2727 through 27-2732], a discharge under the provisions of this law is not a conviction of a crime under the laws of this State and may not be used to disqualify a person in any application for employment or appointment to office in either the public or private sector. (Acts 1978, pp. 1621, 1622, eff. July 1, 1978.)

Georgia Code Annotated § 2-501

> The General Assembly may provide, from time to time, for the registration of all electors, but the following classes of person shall not be permitted to register, vote or hold any office, or appointment of honor, or trust in this State, to-wit: 1st. Those who shall have been convicted in any court of competent jurisdiction of treason against the State, of embezzlement of public funds, malfeasance in office, bribery or larceny, or of any crime involving moral turpitude, punishable by the laws of this State with imprisonment in the penitentiary, unless such persons shall have been pardoned. 2nd. Idiots and insane persons.

STATEMENT OF THE CASE

In the 1980 September term of the Superior Court of Catoosa County, Georgia, the Petitioner was indicted for the felonies of burglary and theft by receiving stolen property. (J.A. 1-3, 6-8). Petitioner entered pleas of guilty in both cases, (J.A. 1,6), and was sentenced on October 8, 1980, under the provisions of the Georgia First Offender's Act (GA. CODE ANN. §§ 27-2727 to 2732). (J.A. 4,5,9, 10). The Petitioner was sentenced to serve three years on probation in the burglary case, (J.A. 4), and in the theft by receiving case was given a concurrent one year sentence to be served on probation. (J.A. 9).

The trial court imposed several conditions upon the Petitioner's probation. Among these conditions was the requirement that the Petitioner pay two hundred ($200.00) dollars restitution in the theft by receiving case within four (4) months of October 8, 1980. (J.A. 9). In the burglary case the Petitioner was further ordered to pay a fine of five hundred ($500.00) dollars and fifty ($50.00) dollars restitution; one hundred ($100.00) dollars of which was to be paid immediately, one hundred ($100.00) dollars to be paid the next day (October 9, 1980), and the balance of three hundred fifty ($350.00) dollars to be paid within four (4) months of October 8, 1980. (J.A.4).

On May 29, 1981, the State of Georgia filed a petition in the trial court to revoke the Petitioner's probation. The State's petition alleged that the Petitioner had violated the conditions of his probation by committing a burglary on May 10, 1981,[1] and by failing to make a timely payment of his fine and restitution as ordered under the sentences imposed under the First Offender's Act. (J.A. 11,12). On June 3, 1982, a hearing was held on the State's petition before the Superior Court of Catoosa County. At that hearing the State abandoned the alleged burglary as a ground for revocation of the Petitioner's probation and relied solely on the ground that the Petitioner had failed to pay his fine and restitution as ordered. (J.A. 26). Petitioner's sole defense was that he was indigent and totally unable to comply with the condition of probation requiring him to make payment of a fine and restitution. The Petitioner asserted that to revoke his probation for

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[1] Although it is not a part of the record in this case, Petitioner would state to the Court that after being indicted for this burglary and after a trial on that indictment, a jury found the Petitioner not guilty.

his failure to pay the fine and restitution was in violation of the Equal Protection Clause of the United States Constitution.

After hearing the testimony of the Petitioner, his wife, and a probation officer, and after brief oral argument, the trial court found that the Petitioner violated the conditions of probation by "failing to pay the amount ordered to be paid by Judge Coker, and in further failing to report to the probation officer periodically." (J.A. 45). On these two grounds the court ordered the Petitioner's probation revoked, (J.A. 14,15), and sentenced him to serve a term in the penitentiary.[2]

Since the trial court was unauthorized to revoke Petitioner's probation on a ground not stated in the petition, *Radcliff* v. *State*, 134 Ga. App. 244, 214 S.E.2d 179 (1975), the Georgia Court of Appeals upheld the trial court's revocation solely on the ground that the Petitioner had failed to pay his fine and restitution as ordered. (J.A. 19-21). The Court of Appeals denied a Motion for Rehearing, (Attachment to the Record), and the Georgia Supreme Court denied a Petition for a Writ of Certiorari. (Attachment to the Record). This Court then granted Petitioner's Writ for Certiorari to review this case. (J.A. 50).

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[2] The Trial Court initially sentenced the Petition to serve five years for the offense of burglary, (J.A. 16), and three years to run concurrently for the offense of Theft by Receiving Stolen Property. (J.A. 17). Upon the Petitioner's motion to modify the sentence, the trial court reduced the Petitioner's sentence to the remaining time he originally had to serve on probation. (J.A. 18).

SUMMARY OF ARGUMENT

This Court has previously given consideration to criminal defendants who have been deprived of important rights and benefits solely because of their indigency. With respect to the sentencing phase of the criminal process, it has been held that an indigent defendant cannot receive additional incarceration solely because he is unable to pay a fine. *Tate* v. *Short*, 401 U.S. 395 (1971); *Williams* v. *Illinois*, 399 U.S. 235 (1970). These cases have been held to prevent the jailing of an individual who is financially unable to pay a fine which is a condition of probation. *Barnett* v. *Hopper*, 548 F.2d 550 (5th Cir. 1977). The application of the principles found in the opinions of this Court and in cases decided by the United States Court of Appeals for the Fifth Circuit require a finding that the revocation of the Petitioner's probation violated the Equal Protection Clause of the Fourteenth Amendment to the United States Consititution. The above cases have not applied a traditional analysis under the Fourteenth Amendment. However, such an analysis leads to the same result.

The Equal Protection Clause requires a state to show that a classification is necessary to achieve a compelling state interest if a classification infringes upon a fundamental right or is to the disadvantage of a member of a suspect class. In such a case the classification must be narrowly drawn. In certain limited circumstances which do not involve a suspect class or fundamental right, this Court will require the state to show a substantial relationship between an important state objective and the classification created by the state. *Plyler* v. *Doe*, 50 U.S.L.W. 4650 (1982). Otherwise, the Equal Protection Clause only requires that the classification be rationally related to some legitimate, articulated objective.

The Petitioner is indigent and totally unable to pay the sum required to receive the benefits of serving his probation under the First Offender's Act. His indigency along with a total deprivation of significant benefits places him in a suspect class. In addition, the revocation of the Petitioner's probation resulted in an adjudication of guilt in two felony cases. This adjudication of guilt deprived the Petitioner of several important and fundamental rights, including the right to vote. Since the Petitioner is a member of a suspect class and because there has been an infringement upon his fundamental rights, strict scrutiny should be applied.

Even if this Court should find that strict scrutiny is not appropriate, the classification still cannot withstand an intermediate or lower level of judicial review. There are no articulated state objectives which are furthered by the revocation of the Petitioner's probation. The State of Georgia exceeded the limits imposed by the Equal Protection Clause and therefore the lower courts should be reversed.

ARGUMENT

At the outset it should be stated that this case does not involve nonpayment by an individual who is capable of paying but simply refuses to abide by a court order. This case, likewise, does not raise the issue as to whether there were any grounds other than the Petitioner's failure to pay his fine and restitution upon which the revocation might have been based.

At the time the order under the First Offender's Act was entered requiring the Petitioner to pay his fine and restitution, the Petitioner knowingly consented to and intended to abide by that order. (J.A. 40). In order to pay the first two hundred ($200.00) dollars which was due

immediately, the Petitioner borrowed that money from his parents. (J.A. 34,35). The Petitioner was employed at a Rockwell International Plant at the time his plea was entered, (J.A. 32), and in November of 1980 the Petitioner was laid off from his job. (J.A. 33,41). The Petitioner, having only a ninth grade education, (J.A. 41), and a limited ability to read, (J.A. 37), was unsuccessful in his continued and extensive efforts to gain employment after he was laid off. (J.A. 32,34,36,39). The Petitioner had absolutely no income or property from which he could obtain sufficient funds to comply with the trial court's order. (J.A. 32,36,37). When the time for payment arrived, the Petitioner, in good faith, notified his probation officer that he was without funds to pay the amounts required. (J.A. 37).

The trial court did not make a specific finding of fact that the Petitioner was indigent and unable to pay his fine and restitution as ordered, but such a conclusion is implied by statements made by the court. For example, the court stated, "I know, and I hate to see $550 or the lack of $550, put this boy in prison". (J.A. 45). The court further stated, "I'm well aware of the indigency provision, and I know that there are times when a person doesn't have funds that he's supposed to have, but in any event, the Court finds that this defendant has failed to abide by the previous order of this Court. . . ." (J.A. 45). The only conclusion that can be drawn from the evidence introduced at the hearing and the findings of the court is that the Petitioner was willing but totally unable to pay the fine and restitution as ordered.

I. The Purpose Of The Georgia First Offender's Act Is To Provide Rehabilitation For A Defendant Without Imposing A Criminal Record And Without Incarceration.

The Legislature for the State of Georgia has enacted particular provisions providing specific benefits to certain individuals who for the first time are found guilty of a criminal offense. This legislation is generally referred to as the First Offender's Act and is available to a defendant only one time. GA. CODE ANN. § 27-2727 (Supp. 1981). After an individual enters a plea of guilty, or is convicted of a criminal offense, the trial court may, if it deems the circumstances appropriate, defer further proceedings and place the defendant on probation. GA. CODE ANN. § 27-2727 (Supp. 1981). If a defendant successfully serves his probation, he is discharged without an adjudication of guilt on the underlying crime. "Such discharge shall completely exonerate the defendant of any criminal purpose, shall not affect any civil rights or liberties, and he shall not be considered to have a criminal conviction." GA. CODE ANN. § 27-2728 (Supp. 1981). Once an individual is discharged his prior plea of guilty "may not be used to disqualify . . . [him] in any application for employment or appointment to office in either the public or private sector." GA. CODE ANN. § 27-2728.1 (Supp. 1981).

If a defendant's probation is revoked he must be credited with the time he successfully spent on probation, however, the Judge may then sentence the defendant to any sentence which could have originally been imposed.[3] *Stevens* v. *State*, 245 Ga. 835, 268 S.E.2d 330 (1980). The

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[3] The crime of burglary carries a maximum sentence of 20 years. GA. CODE ANN. § 26-1601 (Supp. 1981). A felony conviction for Theft by Receiving Stolen Property carries a maximum penalty of 10 years. GA. CODE ANN. §§ 26-1806, 1812.

Judge at the time of placing the defendant on probation under the First Offender's Act and the Order entered by the Court must have made it clear that at the time of resentencing after revocation any sentence which could have been originally imposed may then be given. If that is not made clear to the defendant then the trial court at the time of revocation can only enter an adjudication of guilt and require the defendant to serve the remainder of his original probated time. *Id.* The primary purpose of this scheme is to provide rehabilitation for convicted defendants without incarceration or the stigma of a felony. *State* v. *Wiley*, 233 Ga. 316, 210 S.E.2d 790 (1974).

In the present case the Petitioner has lost significant benefits solely because of his inability to pay the fine and restitution. Specifically, he has lost the conditional liberty he enjoyed while on probation and has further been deprived of certain of his civil rights by the entry of an adjudication of guilt.

II. Criminal Defendants Who Are Indigent Are Not To Be Denied Rights And Benefits Or Subjected To Increased Incarceration Solely Because Of Their Indigency.

"Providing equal justice for poor and rich, weak and powerful alike is an age-old problem". *Griffin* v. *Illinois*, 351 U.S. 12,16 (1956) (footnote omitted). For over two and a half decades this Court has been presented with a variety of issues arising out of classifications of individuals based on wealth. This Court recognizes that the Equal Protection Clause to the United States Constitution provides special protection to an individual who is a member of a "discrete and insular" minority and is restricted in his ability to protect his own interests. *See, Graham* v. *Richardson*, 403 U.S. 365,372 (1971).

Griffin v. *Illinois*, 351 U.S. 12 (1956), initiated the efforts of this Court to remove discrimination against indigent defendants in criminal cases. In that case it was held that the State of Illinois violated the Equal Protection Clause of the Constitution when it refused to provide an indigent with a transcript of the trial proceedings which was necessary for the prosecution of an appeal. Not only must a state make available a method for an indigent to exercise his right to prosecute an appeal, but the state must also provide counsel to assure that the exercise of that right will be meaningful. *Douglas* v. *California*, 372 U.S. 353 (1963).

Based upon the principles enumerated in *Griffin*, *Douglas* and other similar cases, this Court has "pointedly demonstrated that the passage of time has heightened rather than weakened the attempts to mitigate the disparate treatment of indigents in the criminal process." *Williams* v. *Illinois*, 399 U.S. 235,241 (1970) (footnote omitted). In *Williams*, this Court held that an indigent could not be imprisoned beyond the statutory maximum term for a specific crime to work off a fine which was also imposed as part of his sentence. This Court held that "once the State has defined the outer limits of incarceration necessary to satisfy its penological interests and policies, it may not then subject a certain class of convicted defendants to a period of imprisonment beyond the statutory maximum solely by reason of their indigency." *Id.* at 241,242. To do so is a violation of the Equal Protection Clause of the United States Constitution.

Where a state has a fine only policy for traffic offenses an indigent cannot be imprisoned to work off the fines imposed for his violation of those traffic ordinances. *Tate* v. *Short*, 401 U.S. 395 (1971). Quoting from a concurring

opinion by Mr. Justice White in the case of *Morris* v. *Schoonfield*, 399 U.S. 508 (1970), this Court held:

> "the same constitutional defect condemned in *Williams* also inheres in jailing an indigent for failing to make immediate payment of any fine, whether or not the fine is accompanied by a jail term and whether or not the jail term of the indigent extends beyond the maximum term that may be imposed on a person willing and able to pay a fine. In each case, the Constitution prohibits the State from imposing a fine as a sentence and then automatically converting it into a jail term solely because the defendant is indigent and cannot forthwith pay the fine in full." *Tate* v. *Short*, 401 U.S. 395,398 (1971).

Imprisonment for the failure of an indigent to pay his fine under those circumstances did not further any legitimate state purpose.

The principles expressed by this Court in the above cases apply with equal force to situations where indigents are unable to pay a fine which is imposed as a condition of probation. *Wood* v. *Georgia*, 450 U.S. 261 (1981) (White, J., dissenting). (Where it was stated that the State of Georgia exceeded the limits of the Constitution when it revoked a defendant's probation for his failure to make installment payments on a fine.); *Barnett* v. *Hopper*, 548 F.2d 550 (5th Cir. 1977). (Where it was held a violation of the Equal Protection Clause to condition a probated sentence upon the immediate payment of a fine and court costs when the defendant was financially unable to pay.); *Frazier* v. *Jordan*, 457 F.2d 726 (5th Cir. 1972). (Where it was held that the imprisonment of an indigent defendant for a failure to pay a fine under an alternate sentence of a $17 fine or 13 days in jail was unconstitutional). *Contra*, *Hunter* v. *Dean*, 240 Ga. 214, 239 S.E.2d 791 (1977); *Barnett* v. *Hopper*, 234 Ga. 694, 217 S.E.2d 280 (1975); *Calhoun* v. *Couch*, 232 Ga. 467, 207 S.E.2d 455 (1974).

In the present case the sentencing judge, by placing the Petitioner on probation, found that no imprisonment was necessary to satisfy the penological interest of the State. Once this determination was made, the Equal Protection Clause prevents the State from subjecting this Petitioner to incarceration for his failure to pay a fine. To do so is to invidiously discriminate against the Petitioner solely because he is indigent.

III. Analysis Under The Equal Protection Clause.

The Equal Protection Clause provides that no state shall "deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV, § 1. A correct analysis under the Equal Protection Clause must first begin with an appropriate description of the classification which is alleged to be constitutionally defective. A state law whether statutorily or judicially created need not specifically designate the classification which is challenged. "[A] law nondiscriminatory on its face may be grossly discriminatory in its operation." *Griffin* v. *Illinois*, 351 U.S. 12,17 n.11 (1956).

In the present case the law of Georgia categorizes individuals who are serving a probated sentence conditioned upon the payment of a fine (or restitution or cost) into two classes; i.e. those who pay and those who don't. The law treats those two classes differently. Specifically, those who pay and otherwise abide by the other conditions of their probation retain their liberty. Those who do not pay go to jail.

It is conceivable that the class which is subject to imprisonment may itself be composed of two types of individuals—those who are able to pay but simply refuse to abide by the order of the court and those who are unable to pay because of their indigency. For the purpose

of this argument, the Petitioner assumes that there is no constitutional infirmity when a court revokes a defendant's probation for a willful failure to pay his fine. The constitutional infirmity of the classification by the State of Georgia is that the class of individuals subject to having their probation revoked is overbroad and overinclusive. Specifically, it includes those individuals who are totally unable to aide by a court's order because of their indigency. In situations where a state must show a compelling state interest the classification must be narrowly drawn and an overinclusive classification will be found to violate the Equal Protection Clause. *E.g.*, *Carey* v. *Population Services International*, 431 U.S. 678 (1977); *Memorial Hospital* v. *Maricopa County*, 415 U.S. 250 (1974).

After defining the classification it must then be decided:

> [F]irst, whether . . .[the classification] operates to the disadvantage of some suspect class or impinges upon a fundamental right explicitly or implicityly protected by the Constitution, thereby requiring strict judicial scrutiny. . . . If not . . . [the scheme] must still be examined to determine whether it rationally furthers some legitimate, articulated state purpose and therefore does not constitute an invidious discrimination violation of the Equal Protection Clause of the Fourteenth Amendment. *San Antonio Independent School District* v. *Rodriguez*, 411 U.S. 1,17 (1973). *Accord*, *Maher* v. *Roe*, 432 U.S. 464 (1977); *Massachusetts Board of Retirement* v. *Murgia*, 427 U.S. 307 (1976).

Strict judicial scrutiny places upon the state the burden of showing that the classification is necessary to achieve a compelling state interest. *Shapiro* v. *Thompson*, 394 U.S. 618 (1969). This state interest must also be legitimate and the classification must be the least intrusive

method of achieving that legitimate compelling interest. *Dunn* v. *Blumstein*, 405 U.S. 330 (1972).

This two-tier analytical model used by this Court has been subject to criticism because of its rigidity and its failure to require more than a mere rational relationship for significant personal rights and interests which do not pass the test required for strict judicial scrutiny. *E.g.*, *Massachusetts Board of Retirement* v. *Murgia*, 427 U.S. 307 (1976) (Marshall, J., dissenting). It has been suggested that this Court has in fact used intermediate standards of review to strike down classifications which do not involve a traditional suspect class or fundamental interest. Gunther, *Forward: In Search of Evolving Doctrine On A Changing Court: A Model For A Newer Equal Protection*, 86 Harv. L. Rev. 1 (1972). In subsequent majority opinions of this Court there appears further support for the argument that intermediate standards of review have been used. *E.g.*, *Craig* v. *Boren*, 429 U.S. 190 (1976) (Where this Court held that "classifications based on gender must serve important governmental objectives and must be substantially related to the achievement of those objectives." *Id.* at 197).

A recent majority opinion of this Court appears to have explicitly accepted a new intermediate level of review. In the case of *Plyler* v. *Doe*. 50 U.S.L.W. 4650 (1982), this Court stated:

> In addition [to strict judicial scrutiny], we have recognized that certain forms of legislative classifications, while not facially invidious, nonetheless give rise to recurring constitutional difficulties; in these limited circumstances we have sought the assurance that the classification reflects a reasoned judgment consistent with the ideal of equal protection by inquiring whether it may fairly be viewed as furthering

a substantial interest of the State. *Id.* at 4654 (footnote omitted).

This Court struck down the Texas law denying undocumented school-age children free public education because that State failed to show a furtherance of some substantial State interest.

In the present case the Petitioner asserts that strict judicial scrutiny is appropriate. However, even if the Court should apply a lower standard of review the revocation of his probation violates the Equal Protection Clause.

A. Petitioner is a member of a suspect class.

In cases involving indigent criminal defendants this Court has previously failed to analyze the Equal Protection Clause by the two-tier analysis outlined above. However, those cases have made it clear that when an indigent criminal defendant is deprived of some important right or his liberty, considerably more scrutiny will be given to a state's justification than in cases where a state's classifications are subjected to the mere rationality test. In *Griffin* it was stated: "In criminal trials a State can no more discriminate on account of poverty than on account of religion, race or color." *Griffin* v. *Illinois*, 351 U.S. 12,17 (1956). This statement, along with the language of this Court in the cases following *Griffin*, clearly indicates that important rights of indigent criminal defendants will be given a high degree of scrutiny when they are infringed upon because of that defendant's poverty. Not only has this Court disapproved of state actions adversely affecting indigent criminal defendants but in certain settings wealth classifications which deprive individuals of certain fundamental or important rights have been disfavored. *E.g.*, *Harper* v. *Virginia Board of Elections*, 383 U.S. 663 (1966). Because of the petitioner's poverty he has been denied his liberty and fundamental rights, and

has been treated differently from a nonindigent criminal defendant.

The petitioner recognizes that "[t]his Court has held repeatedly that poverty, standing alone, is not a suspect classification." *Harris* v. *McRae*, 448 U.S. 297,323 (1980); *Accord, San Antonio Independent School District* v. *Rodriguez*, 411 U.S. 1 (1973); *Maher* v. *Roe*, 432 U.S. 464 (1977). Clearly, classifications based only on wealth are not sufficient to raise the examination of a state's interest to the level of strict judicial scrutiny. As a result the United States Court of Appeals for the Fifth Circuit has been hesitant to designate an individual who was unable to pay his fine which was imposed as a condition of probation as a member of a suspect class, although the result reached by the Court of Appeals was the same as if that individual was a member of such a class. *Barnett* v. *Hopper*, 548 F.2d 550 (5th Cir. 1977).

Close consideration should be given to the principles found in the case of *San Antonio Independent School District* v. *Rodriguez*, 411 U.S. 1 (1973), in determining whether Petitioner is a member of a suspect class. In *Rodriguez* the Texas Public School Systems provided more money per pupil in districts where more affluent citizens resided than in districts where poor people lived. It was alleged that this discrimination was based on wealth and operated to the disadvantage of those individuals living in the poorer districts. It was alleged that this classification was suspect thus requiring strict judicial scrutiny. However, this Court refused to give such treatment to "a large, diverse, and amorphous class, unified only by the common factor of residence in districts that happened to have less taxable wealth than other districts." *Id.* at 28 (footnotes omitted). In the majority holding of the Court, Justice Powell first addressed the

issue of what type of classifications based on wealth have been treated as suspect by this Court. In analyzing the prior decisions of this Court Justice Powell found that impermissible discrimination has been found when two essential factors exist. The first factor requires that the classification contain individuals who "because of their impecunity . . . were completely unable to pay for some desired benefit." *Id.* at 20. The second factor requires that this class of individuals show that as a result of their inability to pay for the benefit they have "sustained an absolute deprivation of a meaningful opportunity to enjoy that benefit." *Id.* at 20. The opinion of Justice Powell clearly implies that individuals who are unable to pay the prescribed sum required to obtain a desired benefit, and as a result are absolutely precluded from receiving that benefit, would comprise a suspect classification and judicial relief would be proper.

Justice Stewart in an concurring opinion explicitly recognized that in some settings classifications based upon wealth are suspect. Apparently, such would be the situation in a setting of a criminal proceeding where there is "actual or functional indigency". *Id.* at 61 n.6. The dissenting opinion of Justice Marshall, with Justice Douglas concurring, finds that classifications based on wealth do not require the same exacting degree of scrutiny as is required in "classifications based on . . . race or alienage." *Id.* at 121. However, Justice Marshall would have applied an intermediate test requiring "careful judicial scrutiny" of Texas' justifications for this classification based on the wealth of the individuals living in the different school districts. *Id.* at 124.

In the present case the Petitioner meets all the requirements which are stated in *Rodriguez* as necessary to exact strict judicial scrutiny. The petitioner was

functionally indigent. He was totally unable to pay his fine and restitution on which his probation was conditioned. The benefits of probation, which were significant, were completely and absolutely denied to him because of his indigency. The peitioner lost his liberty and freedom, the right to be discharged without a criminal record, the opportunity to retain all of his civil rights and liberties, and the opportunity to be free from disqualification for employment or appointment to office in both the public and private sector. Because of Petitioner's indigency he has been completely deprived of all the benefits available to him while he was serving his probation under the First Offender's Act.

B. Petitioner's inability to pay his fine and restitution deprived him of a fundamental right.

The Petitioner's failure to pay the fine and restitution resulted in the entry of an adjudication of guilt to the felonies of burglary and theft by receiving stolen goods. For the purpose of showing an infringement upon the Petitioner's fundamental rights, it is sufficient to note that the entry of the adjudication of guilt for the above crimes resulted in the Petitioner's loss of his right to vote. GA. CODE ANN. § 2-501. This Court has explicitly held that the right to vote is one of the most fundamental rights and that any infringement upon that right because of an individual's economic status is subject to the highest degree of judicial scrutiny. *Harper* v. *Virginia Board of Elections*, 383 U.S. 663 (1966). *See*, *Dunn* v. *Blumstein*, 405 U.S. 330 (1972). Petitioner is aware that his failure to pay the fine and restitution directly related to the entry of the adjudication of guilt, and that it might be suggested that the failure to pay the fine and restitution only indirectly related to the consequential loss of his fundamental right to vote. However, it makes no difference

if the loss of his right to vote was only incidental to the failure to pay the fine and restitution.

In the case of *Bullock* v. *Carter*, 405 U.S. 134 (1972), a candidate for public office was completely unable to pay the required filing fee before his name would be placed upon the ballot. This Court held that the right to become a candidate for public office was not a fundamental right, but that this "exclusionary mechanism" substantially limited the Texas voters "in their choice of candidates." *Id.* at 144. Because of the impact on the voters' fundamental right to vote for a candidate of their own choosing—and this impact is obviously indirect—the Court held that the requirement of the filing fee was subject to strict scrutiny. In the present case the petitioner's fundamental right to vote is more severely and directly affected than were the rights of the Texas voters.

C. There is no sufficient, legitimate state interest which will support the discriminatory classification created by the State of Georgia.

If this Court finds merit in the Petitioner's position that strict judicial scrutiny is to be applied in this case, then the State has the burden of showing that the revocation of the Petitioner's probation was necessary to achieve a legitimate compelling State interest and that the classification drawn by the State was drawn in the lease intrusive method possible. However, even if this Court should apply the lower standard of judicial scrutiny or any intermediate standard, the discrimination against Petitioner cannot be justified. The scheme does not rationally further any "legitimate, *articulated* State purpose".

"The ultimate objective of all criminal laws is the protection of society, and this is as true of the sentencing of offenders as it is of the definition of the specific offenses. . . . The theory of retribution has long been

repudiated, however, and reformation and rehabilitation are today the important goals of criminal correction." Note, *Imprisonment for Nonpayment of Fines and Costs: A New Look at the Law And The Constitution*, 22 Vand. L. Rev. 611,612 (1969) (footnotes omitted). This Court has consistently recognized that imprisonment for the failure to pay a fine must further some legitimate penological interest before it can be justified. This Court has held that there is no rational relationship between a state's penological interest and policies and the imprisonment of an indigent bevond the statutory limits of incarceration for the purpose of working off his fine. Once a State has defined the outer limit of incarceration necessary to satisfy its penological interests, this cannot then be exceeded for the failure of an indigent to pay a fine. *Williams* v. *Illinois*, 399 U.S. 235 (1970). The same result is required whether or not the jail term imposed to satisfy the penalogical interest of the State extends beyond the maximum term authorized by statute. A fine cannot be automatically converted into a jail term for an indigent who is unable to pay that fine. *Tate* v. *Short*, 401 U.S. 395 (1971).

The Georgia Legislature has empowered the trial court judges to determine whether or not an individual is a suitable candidate for probation under the First Offender's Act. The placing of an individual on first offender probation reflects a determination by the State that an individual may successfully be rehabilitated and that the penalogical interest of the State will be satisfied without incarceration. A defendant's probation will be revoked only if that individual shows, by the violation of a condition of his probation, that rehabilitation will be unsuccessful while he is on probation.

In the present case Petitioner was faced with the impossible obligation to pay a fine and restitution. By revoking the Petitioner's probation the State has implicitly stated that the Petitioner was unable to be rehabilitated to a useful member of our society because of his impecunity. Consequently, the State found it necessary to enter an adjudication of guilt, remove his civil liberties, including his right to vote, and imprison the Petitioner. When the State, by its actions, enunciates that the poor cannot be rehabilitated, it is relying on an irrational assumption that the poor are a greater criminal threat to society than are the rich. This irrational assumption is the underlying assertion of which *Griffin* and its progeny have disapproved. Petitioner fails to see how his indigency causes him to be a greater danger to society than if he were not indigent. Likewise, the Petitioner fails to see how the State's action in revoking his probation in any way aided in his rehabilitation by making him a better citizen or person. Clearly, the revocation of the Petitioner's probation does not further the primary penological interest of the State.

A state's criminal laws may also assert a punitive and deterrent penological interest. To the extent that the State would assert these interests, this case is indistinguishable from *Tate*. A state's punitive and deterrent interests are no more served by revoking an indigent's probation than by imprisoning an indigent who is unable to pay a traffic fine as in *Tate*. Likewise, the state's interests were no more served in this case than in the case of *Barnett* v. *Hopper*, 548 F.2d 550 (5th Cir. 1977), where the defendant's probation was revoked for the failure to pay his fine. When the State sentenced the Petitioner under the First Offender's Act there was a recognition that the State's punitive and deterrent interests were sufficiently satisfied wihtout incarceration.

It has been suggested that a state may impose a substitute jail term for the failure of an indigent on probation to pay his fine. However, in such a case it must be made clear that the jail term is "a proper substitute for the fines." *Wood* v. *Georgia*, 450 U.S. 261,287 (1981) (White, J., dissenting). In the present case no such calculation was attempted. At the revocaton hearing, the trial court originally imposed a sentence of five years—two years longer than the original term of probation. Only after the Petitioner's motion and after it appeared to the trial court that the requirements of *Stevens* v. *State*, 245 Ga. 835, 268 S.E.2d 330 (1980), had not been met, was the Petitioner's sentence reduced to the remaining time of his original probation. Under the present case even a partial revocation of the Petitioner's sentence cannot be justified. The benefits which the Petitioner lost when his probation was revoked under the First Offender's Act were very significant. There are many ways available to a state to enforce a fine and restitution without such a severe infringement on an individual's rights and liberties. Through these alternate methods available to the State, the State can sufficiently meet any penal objectives which may be required by the payment of the fine and restitution.

The Georgia Supreme Court has expressed "several reasons justifying the imposition of a lump-sum fine [as a condition of probation], without regard to the ability of the defendant to pay it immediately." *Hunter* v. *Dean*, 240 Ga. 214,216, 239 S.E.2d 791,793 (1977). If a defendant is unable to comply with this type of condition of probation, the Georgia Supreme Court has held that the revocation of probation is justified. That Court stated that when a defendant is placed on probation:

> [T]he judge must decide that the individual defendant is not likely to engage in a continuing course of

> criminal conduct and that the ends of justice and the welfare of society do not require that the defendant presently suffer the penalty imposed by law. *Id.* at 218, 239 S.E.2d at 794. Accord, GA. CODE ANN. § 27-2709(c) (Supp. 1981).

The gist of the Georgia Supreme Court's rationale is that a poor person who does not pay his fine is not a good candidate for probation because his lack of funds make him more likely to continue in a course of criminal conduct. Again, this is the exact rationale disapproved of in *Griffin*.

At trial a defendant's past conduct is examined. In contrast, when a defendant is considered for probation his future conduct is the primary consideration. In *Griffin* this Court held that wealth has no relationship to a defendant's guilt or innocence. In other words, wealth is unrelated to a defendant's past conduct. The logical extension of this rationale is that a defendant's future conduct, likewise, has no relationship to his wealth or lack of wealth. When an indigent is unable to pay his fine, there is absolutely no reason to believe that this fact alone will cause him to pursue a course of criminal conduct or that he will otherwise be a danger to society.

The Georgia Supreme Court also expressed concern that an individual would express to a court that he could pay a fine and that later he would become unable to make the payment. It has been expressly held that a mistaken misrepresentation of the ability of a defendant to pay a fine is not sufficient to authorize the imposition of an unconstitutional sentence. *Barnett* v. *Hopper*, 548 F.2d 550 (5th Cir. 1977).

IV. There Is No Relevant Distinction Between The Petitioner's Failure To Pay His Fine And His Failure To Pay Restitution.

What has been said regarding the nonpayment of a fine applies equally to the nonpayment of court costs. *Williams* v. *Illinois*, 399 U.S. 235,244 n. 20 (1970). The same rationale shows that the nonpayment of restitution does not raise any greater or more important state interests than does the nonpayment of a fine or court costs. *See*, *Hutchinson* v. *Jones*, 477 F.Supp. 51 (N.D. Ga. 1979). Any State interest in enforcing restitution may be carried out without infringement upon the Petitioner's liberties and fundamental rights.

CONCLUSION

Petitioner was adjudicated guilty of two felonies, stripped of several of his most important rights and imprisoned all because he lost his job and was unable to pay a fine and restitution as previously ordered by the trial court. He was treated differently by the State of Georgia than a similar individual with financial means solely because he was indigent. This different treatment by the State of Georgia is in violation of the Equal Protection Clause of the United States Constitution. For this reason Petitioner respectfully requests that this Court reverse the decision of the Georgia Court of Appeals in this case.

Respectfully submitted,

JAMES H. LOHR
HATFIELD, MCCOLPIN,
VAN CLEAVE & STULCE
428 McCallie Avenue
Chattanooga, TN 37402
(615) 756-5880